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No. 91-1671

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM J. MERTENS, ALEX W. BANDROWSKI, JAMES A. CLARKE, and RUSSELL FRANZ,
*Petitioners*,

v.

HEWITT ASSOCIATES, an Illinois Partnership,
*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

**BRIEF FOR BOOKE & COMPANY; KWASHA LIPTON; WILLIAM M. MERCER, INCORPORATED; THE SEGAL COMPANY; TOWERS, PERRIN, FORSTER & CROSBY, INC.; AND THE WYATT COMPANY AS AMICI CURIAE IN SUPPORT OF RESPONDENT**

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## INTEREST OF THE AMICI

Booke & Company; Kwasha Lipton; William M. Mercer, Incorporated; The Segal Company; Towers, Perrin, Forster & Crosby, Inc.; and The Wyatt Company submit this brief amici curiae, pursuant to Rule 37 of the Rules of this Court, with consent of Petitioners and Respondent.

Their letters of consent have been filed with the Clerk of Court.

The amici are consulting firms that provide professional services and support to the sponsors of employee benefit plans governed by the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), on a nationwide basis. Booke & Company provides services from its headquarters in Winston-Salem, North Carolina, and other U.S. offices. Kwasha Lipton is located in Ft. Lee, New Jersey. William M. Mercer, Incorporated, is headquartered in New York, and has offices in 43 U.S. cities. The Segal Company is an international firm, with its principal office in New York, New York, and offices in fifteen other U.S. cities. Towers, Perrin, Forster, & Crosby, Inc. has its principal offices in New York, New York. The Wyatt Company provides consulting services on a worldwide basis with offices in 70 locations.

The amici's services to ERISA plan sponsors involve both actuarial and other consulting services. They advise and assist plan sponsors on such matters as plan design, actuarial valuation and cost management and projection, plan administration, computer management, testing and recordkeeping, and employee communications, for defined benefit, defined contribution, group benefit, flexible benefit, and compensation programs. The amici accordingly have very substantial experience in the provision of services to employee benefit plans of all types and are well-positioned to explain how non-fiduciary service providers work with plan sponsors under ERISA's statutory scheme.

Moreover, the amici have a significant stake in the decision of this Court. As a major part of the non-fiduciary service provider community for ERISA plans, the amici serve tens of thousands of organizations and employee benefit plans, of all sizes and in all industries, having, in aggregate, tens of millions of participants and beneficiaries.



## SUMMARY OF ARGUMENT

Petitioners have asked this Court to create an ERISA cause of action under which non-fiduciary service providers can be held liable for plan losses on the ground that they "knowingly participated" in a plan fiduciary's breach of fiduciary responsibility. The short answer to this request is that Congress itself addressed the imposition of liability for "knowing participation" in a fiduciary breach in section 405(a) of ERISA, and expressly limited such exposure to plan fiduciaries. Moreover, the exclusion of non-fiduciaries from such liability was not inadvertent. Both at the time it enacted ERISA and in its 1989 amendments to the Act, Congress considered and rejected statutory provisions that would have extended liability to non-fiduciaries on knowing participation grounds.

Not surprisingly then, ERISA's civil enforcement scheme, which this Court has repeatedly recognized as "carefully-integrated," crafted with "deliberate care," "comprehensive," and "exclusive," nowhere authorizes a suit against non-fiduciaries for such liability. Section 502(a)(2) of ERISA—ERISA's basic fiduciary liability enforcement provision—cannot support such a cause of action since it permits only suits "for appropriate relief under section 409," which only imposes liability on plan fiduciaries. Thus, section 502(a)(2) is limited necessarily to actions against plan fiduciaries.

Section 502(a)(3)—the only other enforcement provision arguably relevant here—also does not authorize the expansive cause of action advocated by Petitioners. That provision permits civil actions for equitable relief to enforce ERISA's provisions or a plan's terms, or to enjoin or redress any violation of the same. However, ERISA itself *nowhere* imposes fiduciary duties on non-fiduciaries or subjects them to any liability for breach of its fiduciary responsibility provisions on a knowing participation theory.

Thus, section 502(a)(3) provides no basis for a knowing participation action against non-fiduciaries to recover plan losses occasioned by a fiduciary breach for one plain fact—there is *no* substantive provision of ERISA which non-fiduciaries can violate or which can be enforced against them in this context. As a result, the statutory prerequisite for a section 502(a)(3) action against non-fiduciaries for such liability is totally absent.

Nor can the existence of such a cause of action somehow be inferred. As this Court made clear in *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985):

> The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.

The presumption that Congress did not intend to permit remedies beyond those expressly provided in the Act must be conclusive here given Congress' decision to expressly include a cause of action for "knowing participation" liability, but only against fiduciaries, in ERISA itself. That Congress, in enacting ERISA, considered and rejected a provision that would have extended "knowing participation" liability to non-fiduciary parties in interest who engaged in transactions prohibited by the Act only confirms this view.

Congress' adoption of the section 502(*l*) civil penalty in the 1989 amendments to ERISA in the Omnibus Budget Reconciliation Act ("OBRA") does not mandate a contrary result. That provision creates rights only in favor of the Secretary of Labor, and, in fact, was designed to augment the resources available to the Secretary for ERISA enforcement. Moreover, contrary to the Solicitor General's suggestion, the imposition of a civil penalty upon amounts recovered from "other person[s]" who knowingly participate in a fiduciary's breach of trust does not necessarily recognize the existence of the



underlying cause of action here advocated by Petitioners. ERISA itself *does* permit monetary recoveries from "person[s]" other than the breaching fiduciary in a variety of contexts, *e.g.*, under its co-fiduciary liability and prohibited transaction provisions. Indeed, rather than supporting Petitioners' position, contemporaneous legislative history refutes their claim, since the very same Congress that enacted section 502(*l*) expressly *refused* to amend ERISA to extend to plan participants the very cause of action they ask this Court to create.

Petitioners' reliance on "traditional" trust law principles and their unsupported suggestion that Congress "could not have meant" to exclude non-fiduciaries from "knowing participation" liability are equally unavailing. The fact is that Congress *did* address the concept of "knowing participation" liability in ERISA and decided to limit its reach to fiduciaries on a number of occasions. While ERISA clearly was modeled, in large part, on trust law, "traditional" trust law notions simply cannot be used to alter or modify this Congressional choice. Moreover, any reliance on "traditional" trust law principles to do so here would be particularly inappropriate since in fashioning ERISA's fiduciary responsibility provisions, Congress modified the common law in a number of significant respects that have a direct bearing on the question of non-trustee liability, most notably, by expanding the definition of "fiduciary" to include a broad range of non-trustees.

Indeed, when stripped to its essence, Petitioners' argument amounts to little more than the familiar refrain repeatedly rejected by this Court—that this Court should recognize a cause of action because it represents "good policy." Such policy considerations have never been a basis for implying additional remedies under a federal statute, particularly where, as here, "Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97 (1981) (*quoted* with approval in *Massachusetts*

*Mut. Life Ins. Co. v. Russell*, 473 U.S. at 147). As this Court has made clear, "[t]he federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *California v. Sierra Club*, 451 U.S. 287, 297 (1981) (*quoted* with approval in *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. at 145).

In any event, other than adding another potential "deep-pocket" defendant, the "salutary" impact of recognizing the cause of action advocated by Petitioners is far from certain. If nothing else, the existence of such a cause of action will markedly change the relationship between plan fiduciaries and sponsors, on the one hand, and advisors, on the other, to the detriment of all members of the employee benefit community. The ever-increasing complexity of employee benefit plan law and administration has made the assistance of professional advisors essential. However, while ERISA both encourages, and, in some cases, mandates their use,[1] the ERISA line between fiduciary and professional service provider has been clearly defined. Fiduciaries are responsible for plan administration and management. Although fiduciaries can, and increasingly must look to service providers for advice and assistance in discharging their duties, ultimate decision-making authority, as well as the ultimate responsibility for those decisions, remains with the plan fiduciaries.

The cause of action advocated by Petitioners would blur this distinction. In effect, it will make the advisor the "guarantor" of the fiduciary's actions under as-yet undeveloped legal standards that will have no statutory moorings and no limitations other than the ingenuity of the plaintiffs' bar and the courts. Faced with the spectre of this uncertain ERISA liability, professional service providers ~~may be~~ tempted to provide their advice in a manner that will limit their own potential liability

[1] *See, e.g.*, ERISA sections 403(c)(2) (authorizing use of advisors); 103(a)(3) (accountants required); and 103(a)(4) (actuary required for certain plans).



just as demonstrated by experience in the medical profession where the practice of "defensive," rather than "cost-effective" medicine has become the rule. Even apart from the attendant costs, such a result is hardly likely to advance the interests of plan fiduciaries who, in discharging their duties to participants and beneficiaries, must make decisions that are often difficult, rarely susceptible to one correct response, and always subject to second-guessing.

Nor will the negative consequences of this cause of action be limited to its impact on the advisory role played by professional service providers in the plan decision-making process. As easy and attractive "targets," professional service providers are sure to incur additional costs in guarding against, and ultimately defending the "strike" suits this cause of action will engender. These added costs of doing business inevitably will be passed on to plans themselves, and ultimately to their participants and beneficiaries. This Court therefore should refuse once again an invitation to "tamper with" ERISA's civil enforcement scheme and affirm the decision below. *Massachusetts Mut. Life Ins. Co.*, 473 U.S. at 147.

## ARGUMENT

### I. ERISA DOES NOT PROVIDE A CAUSE OF ACTION AGAINST A NON-FIDUCIARY SERVICE PROVIDER THAT KNOWINGLY PARTICIPATES IN A BREACH OF FIDUCIARY DUTY.

#### A. Given That Section 405(a) of ERISA Expressly Imposes Knowing Participation Liability, But *Only* Upon Plan Fiduciaries, ERISA's Civil Enforcement Scheme Does Not Permit the Cause of Action Advanced by Petitioners.

As this Court has frequently recognized, the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), is a carefully drawn, "comprehensive and reticulated" statute. *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980); *accord, e.g.*, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 44-46 (1987).

In fashioning ERISA's comprehensive regulatory scheme, Congress included a "carefully integrated civil enforcement"[2] mechanism, set out in ERISA § 502(a), that expressly affords participants and beneficiaries of ERISA-regulated plans numerous remedies to protect their legitimate plan interests. This carefully-crafted civil enforcement mechanism does not authorize the cause of action that Petitioners seek to assert in this case—an action against a non-fiduciary service provider to recover plan losses based on his alleged knowing participation in a plan fiduciary's breach of duty.

As a threshold matter, the fact that Congress itself expressly addressed the imposition of "knowing participation" liability in section 405(a) of ERISA, but *limited* that exposure to plan fiduciaries, should dispose of the issue. By its express terms, section 405(a)(1) provides that "a fiduciary . . . shall be liable for a breach of fiduciary responsibility of another fiduciary if he participates knowingly in . . . an act or omission of such other fiduciary, knowing such act or omission is a breach." Thus, Congress clearly knew how to impose liability under ERISA for knowing participation in a fiduciary breach when it intended to do so. That it did so, but only for co-fiduciaries, is the best evidence that non-fiduciaries do not face such ERISA liability.

Given the absence of any substantive ERISA provision imposing such liability on non-fiduciaries, it is not surprising that ERISA's civil enforcement scheme *nowhere* authorizes the cause of action advocated by Petitioners. Section 502(a)(2)—ERISA's basic fiduciary liability enforcement provision—cannot support such a cause of action since it only permits suits "for appropriate relief under section 409." That latter provision, which, *inter alia*, establishes liability for losses suffered by a plan as a result of a breach of fiduciary duty, is specifically limited to "[a]ny person who is a fiduciary with respect to a plan." ERISA § 409(a). Accordingly, section 502(a)(2)

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[2] *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. at 146.



necessarily authorizes actions *only* against a plan fiduciary.

Section 502(a)(3)—the only other civil enforcement section arguably available in this context—likewise cannot be read to authorize the cause of action Petitioners seek to assert. As the Ninth Circuit recognized in *Nieto v. Ecker*, 845 F.2d 868, 873 (9th Cir. 1988), any construction of section 502(a)(3) to authorize the very relief against non-fiduciaries specifically denied under sections 409 and 502(a)(2) would render those latter provisions "superfluous." Section 502(a)(3) thus cannot be construed broadly to sanction the imposition of ERISA liability on non-fiduciaries on a "knowing participation" basis without doing violence to fundamental canons of statutory interpretation. 845 F.2d at 873-74.

Moreover, the recognition of such a cause of action finds no textual support in section 502(a)(3). That provision authorizes plan participants to bring a civil action:

> (A) to enjoin any act or practice *which violates any provision of this title or the terms of the plan*, or (B) to obtain other appropriate equitable relief (i) to redress *such violations* or (ii) to *enforce any provisions of this title or the terms of the plan.*

ERISA § 502(a)(3) (emphasis added). Accordingly, a party is subject to suit under section 502(a)(3) *only* to secure his compliance with a substantive provision of ERISA or the plan, or to enjoin or redress his violation of either, and then *only* for equitable relief. Since ERISA neither imposes fiduciary duties on non-fiduciaries nor subjects them to liability for violations of its fiduciary responsibility provisions, section 502(a)(3) cannot be read to authorize actions against non-fiduciaries to recover plan losses resulting from a fiduciary breach on a "knowing participation" theory or otherwise. In sum, section 502(a)(3) is simply not available to both "create" and then to "enforce" against non-fiduciaries a liability nowhere imposed upon them by ERISA's substantive terms.

This, of course, is not to suggest that non-fiduciary service providers would never be subject to suit under section 502(a)(3), since ERISA does impose certain substantive obligations upon them. For example, because a service provider to an ERISA-regulated plan is a "party in interest" with respect to that plan, *see* ERISA § 3(14)(B), section 406 expressly prohibits certain transactions between it and an employee benefit plan. *See Nieto v. Ecker*, 845 F.2d at 873-74. A non-fiduciary service provider[3] who engages in transactions that violate this proscription would, under appropriate circumstances, be subject to suit under section 502(a)(3) for equitable relief to remedy this violation of the Act. *Id.*[4] Similarly, to the extent that certain service providers have express professional obligations under ERISA, *see* discussion, *infra*, their actions that violate such statutory duties might support an action for equitable relief against them under section 502(a)(3).

No such circumstances are present here. Petitioners have effectively conceded, by failing to appeal from adverse rulings in the courts below, that Respondent did not engage in any prohibited transactions under ERISA (Pet. Br. 7 n.2), and that Respondent did not breach its professional obligations under the Act (Cert. Pet. 7 n.3). Therefore, Petitioners have not and cannot identify any specific provision of ERISA that Respondent arguably has violated, much less one that imposes liability

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[3] Although section 406 is phrased in terms of a fiduciary's duty ("[a] fiduciary with respect to a plan shall not . . ."), the fact that the section also imposes duties on parties in interest is confirmed by ERISA § 502(i) and I.R.C. § 4975, which authorize the assessment of civil penalties and excise taxes upon a party in interest, or "disqualified person," under the Internal Revenue Code, who participates in a prohibited transaction.

[4] In addition, the prohibited transaction penalties and excise tax require correction of the prohibited transaction by the party in interest or disqualified person as a necessary predicate to avoid a punitive 100% excise tax. I.R.C. § 4975(b); ERISA 502(i).



upon it, and section 502(a)(3) does not authorize them to proceed.

### B. The Legislative History Confirms That a Cause of Action Based on a Non-Fiduciary's Knowing Participation in a Fiduciary Breach is Not Available.

Despite the clear absence of any statutory basis for a knowing participation action against non-fiduciaries, Petitioners argue that "Congress could not have meant to exempt from liability those [non-fiduciaries] who knowingly assist in the commission of fiduciary breaches" (Pet. Br. 23). However, ERISA's legislative history demonstrates that the omission of the knowing participation cause of action sought by Petitioners was not inadvertent. Rather, that legislative history makes clear that Congress intended to protect participants' benefit interests and to regulate the relationship of non-fiduciary service providers to employee benefit plans by other means.

First, Congress adopted a function-based definition of "fiduciary," rather than a definition based on title or status, cognizant that such a definition would expand the universe of parties with fiduciary responsibility and potential fiduciary liability under ERISA.[5] Congress was well aware of the impact of this functional definition on service providers to employee benefit plans, such as consultants, attorneys and other professional advisors. In this regard, Congress made clear that while the performance of ordinary professional services would not make such parties fiduciaries to the plans they serve, they, like any other entity, would become ERISA fiduciaries if and to the extent that their

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[5] ERISA § 3(21); *see also* S. Rep. No. 127, 93d Cong., 1st Sess. 11 (1973) (one particular concern was "the types of persons who should be deemed pension 'fiduciaries' "); *accord*, H.R. Rep. No. 533, 93d Cong., 1st Sess. 7 (1973).

duties extended beyond their ordinary functions to encompass discretionary authority over a plan or its assets:

> While the ordinary functions of consultants and advisers to [ERISA] plans . . . may not be considered as fiduciary functions, it must be recognized that there will be situations where such consultants and advisers may because of their special expertise, in effect, be exercising discretionary authority or control with respect to the management or administration of [a] plan or some authority or control regarding its assets. In such cases, they are to be regarded as having assumed fiduciary obligations within the meaning of the applicable definition.

H.R. Conf. Rep. No. 1280, 83d Cong., 2d Sess. 323 (1974) (hereinafter "ERISA Conf. Rep. No. 1280").[6] Where the activities of service providers did not extend into the fiduciary area, however, their ERISA status was limited to that of "party in interest" to a plan under ERISA § 3(14)(B). Thus, Congress clearly recognized the distinction between service providers who had acquired fiduciary status, and those who had not.

Second, contrary to Petitioners' implicit suggestion, this distinction is not one without meaning. Having adopted a functional definition of fiduciary, Congress consciously delineated the responsibilities and potential liabilities of ERISA fiduciaries, on the one hand, and of non-fiduciary parties in interest, on the other. *See* ERISA Conf. Rep. No. 1280, at 295 (Title I "applies rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries" while the conduct of non-fiduciary parties in interest is governed primarily under the tax provisions of Title II); at 299 (discussing knowing participation liability of co-fiduciaries); and at 306 (discussing allocation of rules of conduct for fiduciaries and parties in interest between Title I and Title II, respectively).

[6] *Accord* 29 C.F.R. § 2509.75-5, Q&A-D-1 (1992).



Plan fiduciaries, including service providers who assume fiduciary status by virtue of their discretionary authority or control over a plan or its assets, were subjected to the full scope of ERISA liability. That liability, as noted earlier, expressly includes potential co-fiduciary exposure under section 405 for knowing participation in another's fiduciary breach.

In contrast, the potential exposure of non-fiduciary service providers generally was limited to the assessment of excise taxes under I.R.C. § 4975, or alternatively, of civil penalties under ERISA § 502(i), in the event they participate in a prohibited transaction. Indeed, in limiting the liability of non-fiduciary service providers in this fashion, Congress expressly considered and rejected the Senate-passed version of ERISA that would have imposed personal liability upon them for knowing participation in transactions prohibited by the Act.[7]

Congress' decision not to impose knowing participation liability on non-fiduciary service providers was not modified in any way by the subsequent adoption of section 502(*l*). Section 502(*l*) was added to ERISA by the Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2106 (1989). While this section makes express reference to the "knowing participation" of "any other person" in a breach or violation of the fiduciary re-

[7] The Senate-passed version of ERISA, H.R. 2, 93d Cong., 2d Sess., § 511(i) (1974), *reprinted in* Senate Subcommittee on Labor, 94th Cong., 2d Sess., Legislative History of the Employment Retirement Income Security Act of 1974, pt. III, at 3780 (Comm. Print 1974) would have amended the Welfare and Pension Plans Disclosure Act to establish personal liability for losses to a plan fund not only on the part of fiduciaries, but also on the part of "[a]ny party in interest who participates in a transaction prohibited by this Act knowingly, or with reason to know that the transaction was a transaction to which this Act aplies." *Compare* ERISA Conf. Rep. No. 1280, at 295 (under the Senate bill, fiduciaries and parties in interest would have been personally liable for losses sustained by a plan). This provision was rejected by the ERISA conferees.

sponsibility provisions of ERISA, it does so only in the context of the mandatory assessment by the Secretary of Labor of the new civil penalty established by that provision.

Thus, by its express terms, section 502(*l*) creates *only* a civil penalty in favor of the Secretary; it does *not* create any cause of action or rights against non-fiduciaries in favor of participants and beneficiaries. That it does not extend any rights to participants and beneficiaries is underscored by the fact that the civil penalty is payable only to the Government and was adopted specifically to augment the Secretary's resources for ERISA enforcement, in lieu of an increase in the premiums payable to the Pension Benefit Guaranty Corporation ("PBGC") for plan termination insurance. H.R. Conf. Rep. No. 386, 101st Cong., 1st Sess. 431-32 (1989), *reprinted in* 1989 U.S.C.C.A.N. 1906, 3034-35. Moreover, the penalty can only be assessed in connection with actions "instituted by the Secretary" under sections 502(a)(2) or 502(a)(5) (permitting actions by the Secretary for equitable relief), or in connection with settlements reached by the Secretary.

Nor is the imposition of the section 502(*l*) penalty upon "persons" other than fiduciaries necessarily premised on the existence of an underlying cause of action against non-fiduciaries for knowing participation in a fiduciary breach as the Solicitor General contends. S.G. Br. at 7-8. To the contrary, there *are* instances under ERISA where a "recovery" can be obtained from a "person" other than the fiduciary who has engaged in the breach even in the absence of such an underlying cause of action. For example, Section 405 identifies an entire category of "other person[s]"—co-fiduciaries—who face express liability under ERISA where they "knowingly participate" in a fiduciary's breach of trust. Similarly, the Secretary of Labor may obtain from non-fiduciary parties in interest monetary payments to plans to "correct" prohibited transactions.[8] The Department of Labor both in the preamble to, and its proposed regulations under section 502(*l*) made clear that the civil penalty will be assessed against amounts recovered in correction of prohibited transactions. DOL Prop. Reg. § 2560.502(*l*)-1(c), 55 Fed. Reg. 25288, 25289-90 (1990).[9] Thus, this Court's refusal to expand ERISA's civil enforcement scheme to include an additional remedy against non-fiduciaries in no way will render section 502(*l*) a nullity insofar as "other person[s]" are concerned.



Indeed, any doubt that Congress did not intend to expand the remedies available to plan participants or beneficiaries through section 502(*l*) is dispelled by contemporaneous legislative history. The same Congress that adopted section 502(*l*) simultaneously refused to adopt a House-passed amendment to ERISA section 409 that would have expressly overruled the Ninth Circuit's decision in *Nieto v. Ecker* and imposed personal liability on non-fiduciaries for any monetary losses suffered by a plan as a result of a fiduciary breach in which they knowingly participated. *Compare* H.R. Rep. No. 247, 101st Cong., 1st Sess. 77-78 (1984), *reprinted in* 1989 U.S.C.C.A.N. 1906, 1969-70, *with* H.R. Conf. Rep No. 386, *supra*. Thus, at the same time that Congress adopted section 502(*l*), it refused to extend to plan participants the very cause of action they now seek. This Court must do likewise.[10]

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[8] Under I.R.C. § 4975(f)(5), correction requires:

> undoing the transaction to the extent possible, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards.

*Id.*, *see also* I.R.C. § 4975(h) (Secretary of Labor's right to seek a correction before imposition of 100 percent excise tax).

[9] Indeed, Congress recognized this nexus between the section 502(*l*) penalty and the prohibited transaction sanctions by permitting the penalty to be an offset against the prohibited transaction sanctions. *See* ERISA Section 502(*l*)(4).

[10] Petitioners' suggestion that a knowing participation cause of action must be available to them because the language of the

**C. Where Congress Has Expressly Addressed Knowing Participation Liability and the Scope of Non-Fiduciary Service Providers' Duties Under ERISA, an Additional Federal Common Law Remedy Should Not Be Implied.**

As this Court made clear in *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. at 146, courts "must be chary" of importing remedies into ERISA that are not expressly provided in the statute: "The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Id.* at 146; *see also Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 645 (1981) ("'The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme[.]'".) (*quoting Northwest Airlines v. Transport Workers*, 451 U.S. 97 (1981)). That presumption should be conclusive here, given that Congress did not impose "knowing participation" liability on non-fiduciaries in enacting ERISA, and thereafter refused to override that choice in enacting the OBRA amendments.

The indisputable fact that ERISA's fiduciary responsibility provisions were based, with appropriate modifications, on the traditional law of trusts, *see, e.g.*, H.R. Rep. No. 533, 93d Cong., 2d Sess. 13, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4643, does not require a different result. While a knowing participation cause of action may have been available against non-trustees as a traditional trust law remedy, *see* Pet. Br. 20, neither ERISA's

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general civil enforcement provision in favor of the Secretary (ERISA § 502(a)(5)) is the same as that in favor of participants (ERISA § 502(a)(3)) is unavailing. (Pet. Br. 15.) While both provisions permit suit "to enforce any provision of [title I]," section 502(*l*), by its express terms, mandates the assessment of a civil penalty only in connection with suits brought by, or settlements with, the Department of Labor. It confers no rights on, and cannot be enforced by, plan participants and beneficiaries.



legislative history nor this Court's decisions suggest that traditional trust law can or should be incorporated wholesale into the statute, or be used to create or to imply an ERISA cause of action. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (fiduciary provisions "'codif[y] and mak[e] applicable to [ERISA] fiduciaries *certain principles* developed in the evolution of the law of trusts.'") (emphasis added) (*quoting* H.R. Rep. No. 533, 93d Cong., 1st Sess. 11 (1973)). Rather, as the Eleventh Circuit has recognized:

> the statute is, in its contours, meaningfully distinct from the body of the common law of trusts. . . . [A] court should only incorporate a given trust law principle if the statute's text negates an inference that the principle was omitted deliberately from the statute.

*Useden v. Acker*, 947 F.2d 1563, 1581 (11th Cir. 1991).

Rather than refuting this inference, ERISA suggests a clear departure from the common law in this area. Under traditional trust law principles, only the trustee was in a fiduciary relationship to the trust and its beneficiaries, *see Restatement (Second) of Trusts* § 2 Comment b (1959); I William F. Frachter, *Scott on Trusts* § 2.5 (4th ed. 1987), so that fiduciary duty principles alone could not provide any basis of recovery against non-trustees. Accordingly, the recognition of a knowing participation cause of action provided a basis at common law to reach non-trustees who, although not fiduciaries, were responsible, at least in part, for the trust's losses. *See Restatement (Second) of Trusts* at § 326; I *Scott on Trusts* at § 326.5; George T. Bogert, *Trusts* §§ 166-67 (6th ed. 1987).

Congress approached this problem differently in ERISA, as noted earlier, by adopting a functional definition of fiduciary that greatly expands the universe of accountable persons. As a result, ERISA's fiduciary principles are available to impose liability on *any* party who exer-

cises sufficient discretionary authority or control over a plan or its assets to cause a loss, regardless of his status or title. Moreover, once a party attains fiduciary status, ERISA expressly imposes co-fiduciary liability on him for another fiduciary's misconduct not only when he knowingly participates in or conceals a breach of duty, but also when he fails to take reasonable steps to correct a breach that he discovers. *See* ERISA § 405(a). Congress' express expansion of fiduciary liability under ERISA beyond trustees and its express imposition of knowing participation liability on co-fiduciaries alone negates any notion that it intended the courts to expand liability still further to non-fiduciaries by reference to trust law principles.[11]

## II. THE CREATION OF AN ERISA CAUSE OF ACTION FOR NON-FIDUCIARY KNOWING PARTICIPATION WOULD NOT SERVE THE PURPOSES OF ERISA.

The creation of an ERISA common law remedy against non-fiduciary service providers is not essential to implement the benefit protection purpose of the statute. Moreover, the creation of such a remedy could be expected to have significant adverse consequences for all parties involved with ERISA-regulated plans, including service providers, plan sponsors and fiduciaries, and, ultimately, plan participants and beneficiaries.

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[11] As noted earlier, Congress also addressed the problem of third party liability through its enactment of ERISA's prohibited transaction rules. Those provisions specifically prohibit certain specified transactions between plans and parties in interest. *See* ERISA § 406(a). Non-fiduciaries who engage in transactions violative of those provisions are subject not only to liability for excise taxes and civil penalties, but also for appropriate equitable relief to reverse the illegal transaction under ERISA section 502(a)(3). *See, e.g.*, *Nieto v. Ecker*, 845 F.2d at 868. Moreover, they are subject to such relief regardless of whether they engaged in such transactions with knowledge of their illegality. *Call v. Sumitomo Bank*, 881 F.2d 626 (9th Cir. 1989); *Nieto v. Ecker*, 845 F.2d at 868.



### A. Professional Service Providers Are Not Free From Oversight or Regulation Under ERISA

Contrary to Petitioners' arguments, ERISA itself protects employee benefit plans against misconduct by service providers in a variety of fashions. For example, ERISA has created a comprehensive structure for governmental oversight of employee benefit plans by the Secretary of Labor, Secretary of the Treasury, and, in the case of defined benefit pension plans, the Pension Benefit Guaranty Corporation. Similarly, ERISA's prohibited transaction provisions specifically proscribe a wide variety of transactions between employee benefit plans and service providers. *See* ERISA § 406. Moreover, two important categories of service providers—accountants and actuaries—are subject to various duties and obligations under the Act. *See* ERISA § 103(a)(3) (qualified public accountants); § 103(a)(4) (enrolled actuaries); § 103(d) (actuarial reports); §§ 3041-42 (enrollment of actuaries). Finally, service providers who violate any of the express provisions of ERISA regulating their conduct are subject to suit for appropriate equitable relief under section 502(a)(3).

These specific statutory provisions are complemented by the professional codes of conduct applicable to professional service providers such as actuaries, accountants and lawyers. In the case of actuaries to ERISA plans, ERISA itself provides such supervision through the Joint Board for the Enrollment of Actuaries ("JBEA") which it created. ERISA §§ 3041-42; *see* 20 C.F.R. Part 901 (1992). Lawyers and accountants, on the other hand, are subject to state examination, licensing, and regulation, and may be disciplined by state authorities in appropriate cases for breach of such professional standards. In enacting ERISA, Congress was well aware of the existing state licensing and regulation of professional duties and relationships in the case of accountants and attorneys. In-

deed, Congress created the JBEA to provide a comparable licensing and regulatory body for actuaries. H.R. Rep. No. 807, 93d Cong., 2d Sess. 27-28 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4758-59; *accord*, S. Rep. No. 127, 93d Cong., 2d Sess. 17, *reprinted in* 1974 U.S.C.C.A.N. 4838, 4853.

### B. The Cause of Action Advocated by Petitioners Will Transform the Role Played by Professional Service Providers in the Plan Decision-Making Process, to the Detriment of All Members of the Employee Benefit Plan Community

To understand the impact a knowing participation cause of action would have on the relationship between professional service providers and the plans or plan sponsors they serve, it is necessary to review the role that professional service providers play under ERISA. While professional service providers are not free from regulation under ERISA, there is no question that the principal focus of Congress' remedial scheme was the plan fiduciary. Plan fiduciaries are subjected to an exacting code of conduct under the Act and are charged with ultimate responsibility for all aspects of plan administration and management. *See* ERISA § 2; ERISA §§ 402-410.

ERISA clearly permits plan fiduciaries to retain professional service providers to assist them in discharging their plan responsibilities (ERISA § 402(c)(2)), and, in some cases, mandates their use. *See* ERISA § 103(a)(3) (actuaries); ERISA § 103(a)(4) (accountants). Moreover, the ever-increasing complexity of employee benefit law and administration has encouraged even greater use of professional service providers. Nevertheless, the ERISA line between fiduciary and advisor remains clear. Although fiduciaries can look to service providers for advice and assistance in discharging their plan duties, ultimate decision-making authority, as well as the ultimate responsibility for those decisions, remains with the plan



fiduciaries. ERISA § 402(a)(1); ERISA § 404; ERISA § 409. The service provider's role is advisory, not fiduciary.[12]

In addition to plan fiduciaries, service providers give assistance to plan sponsors, typically employers, in making a variety of plan-related decisions. Those decisions, relating to such matters as plan establishment, design, amendment and termination, are "settlor" functions that are outside the purview of ERISA's fiduciary responsibility provisions. DOL Inf. Letter (Mar. 2, 1987), *reprinted in* 14 BNA Pen. Rep. No. 14, at 430 (1987). As the courts have observed:

> There is a world of difference between administering a [benefits] plan in accordance with its terms and deciding what those terms are to be. A company acts as a fiduciary in performing the first task, but not the second. . . .
>
> The case law . . . makes it clear that when an employer decides to establish, amend or terminate a benefits plan, as opposed to managing any assets of the plan and administering the plan in accordance with its terms, its actions are not to be judged by fiduciary standards.

*Musto v. American General Corp.*, 861 F.2d 897, 911 (6th Cir. 1988), *cert. denied*, 490 U.S. 912 (1989). In this context, not only is the service provider's role advisory, but also, neither the plan sponsor nor the service provider is a fiduciary.

In rendering their advice, professional service providers frequently are presented with issues as to which there is no single, uniquely correct answer. In the case of an actuary, the issue presented is the funding of a plan, to provide the promised level of benefits, over a period that

[12] Only in one circumstance—investment advice for a fee—does the provision of advice make a service provider a fiduciary. *See* ERISA § 3(21)(A)(ii).

extends thirty to fifty years into the future. The actuary cannot predict with certainty which participants ultimately will receive benefits under the plan, the aggregate amount of their benefits, or the date on which benefit payments will commence. Nor can the actuary know the future rate of return on plan assets. Instead, the actuary must estimate the plan's funding requirements based on appropriate actuarial assumptions about the future and on the plan sponsor's selection of a funding method to provide for the distribution of funding requirements over the future.[13]

The actuarial assumptions with respect to a plan are separate and distinct from the plan's funding method, and it is the role of the actuary to select these assumptions consistent with its obligations under the Act. In so doing, the actuary must develop informed estimates as to (1) the factors that will determine the amount of

[13] The sponsor of an ERISA plan, generally the employer, selects a funding method, with the actuary's advice, from the limited range set forth in section 3(31) and Treasury Regulations §§ 1.412(c)(1)-1 to (c)(3)-2. Once selected, the funding method may be changed only with the approval of the Secretary of the Treasury. ERISA § 302(c)(5).

The selection of a funding method is not a fiduciary decision under ERISA, but is instead a "settlor" function, which permits the decision to be made without regard to the exclusive interests of plan participants and beneficiaries. Both the labor and tax law provisions of ERISA include detailed "minimum funding standards," *see* ERISA §§ 302-07; I.R.C. § 412, that rest the responsibility for making plan contributions on the sponsoring employer or employers, ERISA § 302(c)(11); I.R.C. § 412(c)(11), not on plan fiduciaries. (Significantly, the rules governing the minimum funding level in Title I of ERISA do not appear in part 4, relating to fiduciary responsibilities, but instead are codified in a separate part 3.) Consistent with this allocation of responsibility, the penalty for failure to make required plan contributions is a lien (in favor of the plan) on the property of the delinquent employer or employers and other members of the same "controlled group" (within the meaning of I.R.C. §§ 414(b), (c), (m), (o)). ERISA § 302(f); I.R.C. § 412(n). In addition, excise taxes are imposed, again on the delinquent employer or employers, pursuant to I.R.C. § 4971.



plan assets in the future, such as future interest rates and plan investment earnings, and (2) the factors that will determine the aggregate amount of benefits ultimately due from the plan, such as future employee turnover and compensation increases. Because these estimates cannot be definitively correct or incorrect, a pension plan's actuary generally proceeds by developing a range of acceptable assumptions before making a final selection. And in making that final selection, the actuary will consider the views of other parties, including the plan sponsor who is often the best source of information about probable employee turnover, early retirement rates, and similar factors.

As demonstrated in Part I, *supra*, ERISA does not impose fiduciary duties on service providers in the performance of their ordinary professional responsibilities such as that involved in this case. The absence of fiduciary status is compelling where actuaries are selecting appropriate assumptions for a pension plan, because—contrary to the implicit theory of Petitioner's complaint—no one set of assumptions is invariably appropriate and in the best interests of all plan participants and beneficiaries. For example, a conservative set of assumptions may overstate the actual costs of a plan over time, resulting in a lower level of promised plan benefits (due to their estimated cost) than the plan sponsor could reasonably afford to provide. A more aggressive set of assumptions, on the other hand, may understate future costs, resulting in a higher level of benefits under the plan in its early years but creating a greater risk of future underfunding.[14] Given the inherent potential conflicts among the interests of individual participants in

[14] The set of assumptions involved in this case included the probable rate of early retirement under a plan. It is particularly difficult to develop accurate assumptions about early retirement rates, which—unlike factors such as mortality and even normal employee turnover—vary with events that do not occur systematically and depend heavily on future economic conditions.

the same pension plan, such decisions could never be made in accordance with ERISA's exacting fiduciary standards. ERISA recognizes this by placing such matters outside the purview of its fiduciary standards, and instead, limiting a plan sponsor's choice of funding methods, and, in certain respects, limiting the range of permissible interest rates for actuarial assumptions. *See* ERISA § 302(b)(5)(B)(ii)(I).

If the Court creates the cause of action urged by Petitioners, the non-fiduciary and advisory role of the service provider under ERISA would be dramatically altered. Such a cause of action would largely eviscerate ERISA's distinction between fiduciary and non-fiduciary roles and liabilities, by making service providers legally answerable for decisions that are, under ERISA, entrusted to plan sponsors and fiduciaries. As a result, service providers to ERISA-regulated plans could no longer be certain of the scope of their professional duties, much less the extent of their legal liability in performing those duties. Rather, they would find their best professional estimates or judgments subject to attack based on subsequent, often unpredictable, events.

Equally disturbing is the fact that the legal standards under which their actions would be challenged are as yet undeveloped. Under current law, the elements of a non-fiduciary's "knowing participation" liability to ERISA participants are unknown; indeed, the courts that have addressed such liability have articulated divergent standards. If such liability were based on the same principles as co-fiduciary liability under section 405, *cf. Fink v. National Savs. & Trust Co.*, 772 F.2d 951, 958 (D.C. Cir. 1985) (dictum), then knowing participation could encompass even a passive failure to prevent or to correct a fiduciary breach. *See* ERISA § 405(a)(3) (co-fiduciary liable if he fails to make reasonable efforts to remedy a fiduciary breach known to him); ERISA Conf. Rep. No. 1280 at 299-300 (discussing co-fiduciary lia-



bility).[15] The Seventh Circuit, by contrast, has sought to apply a different standard, requiring an active conspiracy between plan fiduciaries and a non-fiduciary. Thus, in *Pappas v. Buck Consultants, Inc.*, 938 F.2d 531, 542 (7th Cir. 1991), that court held that allegations of incorrect advice and misleading reports by a plan actuary did not state an ERISA claim, because there were no allegations of knowing inducement or conspiracy. *Accord Thornton v. Evans*, 692 F.2d 1064, 1082 & n.42 (7th Cir. 1982) (conspiracy is necessary element of non-fiduciary liability).

Nor will the negative consequences of this cause of action be limited to service providers. Faced with the spectre of this uncertain liability, professional service providers may be tempted to provide their advice in a manner that will limit their own exposure. As demonstrated by analogous experience in the medical profession where the practice of "defensive" rather than "cost-effective" medicine has become the rule, it is hardly likely that the most conservative advice from the advisor's perspective will prove to be the most useful or effective from the plan decision-maker's point of view.[16]

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[15] This standard apparently was applied by the Second Circuit in *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270 at 282-84 (2d Cir. 1992), where (without referring to section 405) the court held that a non-fiduciary could be held liable without proof of intent to harm, with only constructive knowledge of fiduciary's breach, and by merely "failing to act when required to do so." This appears to impose a higher standard of duty on a non-fiduciary than expressly imposed on a co-fiduciary under ERISA section 405. *See* ERISA Conf. Rep. No. 1280 at 299 ("the fiduciary must know the other person is a fiduciary with respect to the plan, must know that he participated in the act that constituted a breach, and must know that it was a breach").

[16] Actuaries, for example, could be expected to select only the most conservative assumptions to reduce, insofar as the actuary may, the risk of future underfunding. But, as noted earlier, conservative assumptions are not invariably appropriate or in the best interests of every plan participant.

Thus, rather than promoting ERISA goals, this cause of action may actually work to deprive plan decision-makers of the type of objective and disinterested information they need in making plan decisions that are often difficult, rarely have one correct answer, and always can be second-guessed.

Moreover, while the prospect of an additional "deep-pocket" defendant in cases of this type may be attractive to the plaintiffs' bar, it is not without cost. Unlike plan fiduciaries who are frequently employees of the plan sponsor and customarially indemnified to the fullest extent permitted by ERISA by the party appointing them, professional service providers rarely enjoy such protection for their plan-related activities. Thus, the expenses incurred by professional service providers in guarding against, and ultimately defending the "strike" suits this cause of action will engender will represent an additional cost of doing business.[17] These costs will inevitably be passed back to the plans in the form of increased fees, to the ultimate detriment of the plans' participants and beneficiaries.

None of these predictable results would serve ERISA's primary purpose " 'to promote the interests of employees' " in employee benefit plans, *Firestone*, 489 U.S. at 113 (quoting *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983) and citing *Russell*, 473 U.S. at 148), because of the attendant costs. Congress was concerned not to burden plans so heavily by ERISA's requirements that "employers respond . . . by decreasing benefits under

[17] Indeed, the potential liability of certain service providers such as actuaries may prove to be substantially greater than for indemnified fiduciaries, or third parties that provide services within a narrowly defined role. The allegations against Respondent in this case, for example, could easily be interpreted to make it liable for mere knowledge of a decision by the plan sponsor to fund the plan at a certain level even though the Respondent's role did not make it responsible for that decision.



existing plans or slowing the rate of formation of new plans. . . ." H.R. Rep. No. 807 at 15, *reprinted in* 1974 U.S.C.C.A.N. 4670, 4682. The various provisions of ERISA accordingly reflect Congress' "careful balancing" of the need to promote and to protect employees' benefits against "the public interest in encouraging the formation of employee benefit plans" by not imposing undue costs. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. at 54 (§ 502(a) enforcement scheme); *see also* H.R. Rep. No. 533, at 1, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4639-40 (projected cost of each provision was analyzed in relation to anticipated benefit). That balance should not be upset here.

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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